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VIA E-MAIL

Maureen Del Duca
Deputy Chief, Investigations and Hearings Division
FCC Enforcement Bureau
445 12th Street, S.W.
Washington, DC 20554

Re: In the Matter of the Merger of Qwest Communications International, Inc.
and U S West Inc., CC Docket No. 99-272

Dear Maureen:

Qwest's December 3, 2000 *ex parte* letter filed in the above-entitled matter: (1) expressly admits that Qwest engaged in two continuing violations of the *Qwest Merger Orders*¹ and section 271 which date as far back as the date when the merger closed and for which no explanation has ever been proffered, (2) makes plain that at least six lit fiber

¹ Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd. 5376 (March 10, 2000) ("March 10 Merger Order"); Memorandum Op. and Order, *Qwest Communications International Inc. and U S West, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11909 (June 26, 2000) ("June 26 Merger Order") (collectively the "*Qwest Merger Orders*").

capacity IRUs,² pursuant to which Qwest provided in-region interLATA service worth in excess of \$260 million,³ also violated the *Qwest Merger Orders* and section 271; and (3) establishes that Qwest filed two Certifications of compliance with the Commission's *Qwest Merger Orders*, that, at a minimum, were inaccurate, undermining the very integrity of the processes which the Commission relies on to ensure compliance with its merger orders. In view of such blatant and serious violations, AT&T respectfully requests that the Commission impose the sanctions set forth in *AT&T's May 2, 2002 Comments*, and impose, as may be appropriate, further sanctions on Qwest and all individuals responsible for filing the Certifications.

1. Qwest's December 3, 2002 *Ex Parte* Admits that it Engaged in Material and Deliberate Violations of the *Qwest Merger Orders* and Section 271

Qwest's December 3, 2002 *ex parte* discloses that at the time the merger closed it failed to divest two leases of in-region interLATA dark fiber and indeed that it extended those leases in 2001.⁴ Qwest asserts that it had committed to divest these leases at the time of the merger because it "recognized that Commission dicta could be read" as holding that

² Qwest entered into dark fiber IRUs with Verio, Inc. and Cais Internet in August 2000, with Abovenet in September 2000, and with Flag Telecom and Star Telecom in October 2000. Complaint, *Touch America, Inc. v. Qwest, Communications International, Inc.*, File No. EB-02-MD-003 (February 2002) ("*IRU formal complaint*"), ¶¶ 52-78, 172 and Affidavit of Frank O'Connor, Exhibit O to the *IRU formal complaint* ¶¶ 3-7 and 16. There were also an unspecified number of governmental lit fiber capacity IRU arrangements. *IRU formal complaint* ¶¶ 66 and the March 7, 2002 Declaration of Kevin Dennehy, Exhibit G to Touch America's Reply to the *IRU formal complaint* ¶¶ 8-13.

³ Amended Answer of Defendants Qwest Communication International Inc., Qwest Corporation and Qwest Communications Corporation, File No. EB-02-MD-003, ¶¶ 142, 145 and 175 (March 13, 2002) ("Qwest Answer to the *IRU formal complaint*").

⁴ Qwest's December 3, 2002 *ex parte* at 2. These leases were with MEANS, Inc. now Onvoy, Inc. ("Onvoy") and Timing Solutions Corporation ("TSC"). The TSC dark fiber lease was extended in early 2001; the Onvoy continued after it expired in April, 2001. Both violated the *March 10 Merger Order* that "upon consummation of the

dark fiber capacity leases constitute the provision of “telecommunications” as defined in the 1996 Act. Qwest tries to blunt the impact of these violations by asserting that it has “credited the customer for all amounts paid under the lease since the date of the merger, plus interest” and sold the fiber to the customer, subject to an ongoing maintenance agreement with Qwest, the terms of which are not disclosed.

Critically, Qwest does not at any time claim that its failure to divest the two dark fiber leases was inadvertent or the result of administrative or technical error. This failure must be viewed as an acknowledgement that its violations were conscious and deliberate. When Qwest has an excuse to rely on, it has never been shy in doing so. For example, Qwest filed an *ex parte* on December 11, 2002 which attempted to explain away only Qwest’s March, 2002 agreement to provide Cable & Wireless with four in-region interLATA private lines.⁵ Qwest’s failure to provide an explanation for its other violations -- *i.e.*, those involving the two dark fiber leases identified in Qwest’s December 3 *ex parte* -- is an admission that Qwest engaged in two deliberate violations of the *Qwest Merger Orders* and Section 271.

But Qwest’s December 3, 2002 *ex parte* also implicitly admits that it engaged in

merger, the merged company will cease providing all interLATA services originating in the U S West region.” *March 10 Merger Order*, ¶ 15.

⁵ In Qwest’s “second” explanation of the C&W “four in region private lines,” Qwest asserts that “the contract was a settlement and leases were not ordered through Orion,” December 11, 2002 *ex parte* at 2, but this single ambiguous reference to “leases” must be read in the context of the entire letter, including: (i) the description of the controls put into place in the Orion system “post-merger;” (ii) the C&W settlement; (iii) Qwest’s “first” explanation that personnel did not review the attachment to the C&W agreement; and (iv) the proposed “fix” for the violation, which is limited to instances involving settlement of disputes. Those facts lead to one conclusion -- Qwest’s December 12 *ex parte* is limited to the C&W “settlement” and, accordingly, does not address Qwest’s failure to divest itself of the two pre-merger leases with third parties. It is also noteworthy that even Qwest’s proffered explanation of the C&W violation is deficient because it is not supported with *any* documentation and

additional violations of the *Qwest Merger Orders* and Section 271 -- *i.e.*, those involving lit fiber IRUs. Specifically, Qwest's grudging acknowledgement in its *ex parte* regarding "Commission dicta" on dark fiber -- presumably the Commission's holding in the *Dark Fiber Order*⁶ -- necessarily applies to its lit fiber capacity IRUs as well. That is because the Commission, in its *Non-Accounting Safeguards Order*, relied on the *Dark Fiber Order* in holding that leases of lit fiber capacity similarly constitute "telecommunications" as defined in the 1996 Act.⁷ Accordingly, Qwest's use of lit fiber capacity IRUs (which are now admittedly nothing more than leases)⁸ to provide in-region interLATA service violates both the *Qwest Merger Orders*⁹ and the Act -- violations that are "conscious and deliberate."¹⁰

2. Qwest's December 3, 2002 *Ex Parte* Further Demonstrates that Qwest Filed Certifications of Compliance that, at a Minimum, were Inaccurate

affidavit(s) or declaration(s). Qwest has also not provided an explanation for why -- or how -- the two leases eluded the auditor over the past two years.

⁶ *Application of Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, 8 FCC Rcd. 2589 (1993), *remanded on other grounds*, *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C.Cir.1994).

⁷ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, As Amended*, Second Order on Reconsideration, 12 FCC Rcd 8653, 8683 n.110, *aff'd on other grounds sub nom. Bell Atlantic Tel. Cos. v. FCC.*, 131 F.3d 1044 (D.C. Cir. 1997).

⁸ *See*, Qwest's Responses to Supplemental Interrogatories, Declaration of G. Anthony Lopez, Vice President and Assistant Corporate Controller, File No. EB-02-MD-003 (filed Nov. 6, 2002) at ¶ 4, *cited* in Touch America's December 12, 2002 *ex parte* in that proceeding at 6. *See also*, AT&T's submissions in this proceeding filed on October 28 (citing to Qwest admission in its September 23, 2002 Form 8K and testimony by Qwest's Chief Financial Officer Oren Schaffer before the House Commerce Oversight Subcommittee) and October 30, 2002 (citing to Qwest admission in its October 28, 2002 Form 8K and related press release).

⁹ Qwest violated its commitment to "sell to Touch America all retail and wholesale private line voice and data services where a circuit provided to a customer crosses a U S WEST LATA boundary, and . . . receive no revenues from these in-region interLATA services" (emphasis added). *June 26 Merger Order*, ¶ 13; *see also, id.*, ¶¶ 8-9; *March 10 Merger Order*, ¶¶ 64, 67 and 70.

¹⁰ Qwest's Answer to the *IRU formal complaint* ¶ 94; *See*, AT&T's October 28, 2002 submission in this proceeding.

Pursuant to the Commission's *March 10 Merger Order*, Qwest "each year, [must have] a senior Qwest executive certify under oath that *all* of Qwest's activities, both those involving the buyer [Touch America] and those excluding the buyer, are consistent with its representations to the Commission in this proceeding and that its on-going business continues to comply with section 271."¹¹ Qwest made two such Certifications, one on April 16, 2001 and the second on March 13, 2002, in the form of Declarations by Mr. Augustine M. Cruciotti, Qwest Executive Vice President. In those Certifications, Qwest's Executive Vice President affirmatively represented under oath that: "[a]s of the closing of the merger of the Company and U S West, Inc, on June 30, 2000, the Company had divested its prohibited in-region interLATA service in accordance with . . . the FCC Orders in Docket No. 99-272 in all material respects."¹² Qwest now admits that at the closing of the merger, it did not divest the two dark fiber leases. Qwest's Executive Vice President further represented under oath that "[f]or the period from July 1, 2000 to December 31, 2000"¹³ and "[f]or the period from January 1, 2001 through December 31, 2001,"¹⁴ "the Company has operated its business in accordance with . . . the FCC's Orders in Docket No. 99-272 in all material respects."¹⁵ As shown above, that too was inaccurate. Qwest's receipt of revenue under two dark fiber leases in 2000 and 2001, Qwest's renewal/extension of both dark fiber leases in 2001, as well as Qwest's provision of interLATA services by means of lit fiber capacity IRUs in 2000 and 2001 were conscious

¹¹ *March 10 Merger Order*, ¶ 27 (emphasis in original).

¹² Declaration of Augustine M. Cruciotti, appended to the April 16, 2001 Letter of Peter A. Rohrbach, Counsel for Qwest, to Ms. Magalie Roman Salas, ¶ 1.

¹³ April 16, 2001 Cruciotti Declaration, ¶ 3.

¹⁴ March 11, 2002 Cruciotti Declaration, ¶ 1.

¹⁵ April 16, 2001 Cruciotti Declaration, ¶ 3; March 11, 2002, Cruciotti Declaration, ¶ 1.

and deliberate violations of the FCC Orders in Docket No. 99-272.¹⁶ Indeed, Qwest's receipt of revenue from the two dark fiber leases continued throughout most of 2002, and Qwest's lit fiber violations continue to this day.

In view of the conscious and deliberate nature of Qwest's violation of the Commission's rules, the Commission should sanction Qwest as well as any individual responsible for filing its Certifications.

Sincerely,

A handwritten signature in black ink, appearing to read "Aryeh Friedman". The signature is fluid and cursive, with the first name "Aryeh" being more prominent than the last name "Friedman".

Aryeh Friedman

cc: Mark Stone
Anthony Dale
Jonathan S. Marashlian
John C. Keene

¹⁶ See also, Touch America's December 11, 2002 *ex parte* in the formal Complaint proceedings at 5, which discusses other "numerous admissions made in the recently concluded arbitrations proceeding between Touch America and Qwest," including the admission that Qwest "failed to remit GSP fees to Touch America far in excess of the \$2 million reported in the March 2002 compliance audit report."